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In the
Supreme Court of the United States

DELBERT WILLIAMSON, ET AL.,
PETITIONERS,

v.

MAZDA MOTOR OF AMERICA, INC., ET AL.,
RESPONDENTS.

On Writ of Certiorari to the
Court of Appeal of California, Fourth Appellate
District, Division Three

BRIEF OF THE GROCERY MANUFACTURERS ASSOCIATION, NATIONAL ASSOCIATION OF MANUFACTURERS, AMERICAN TORT REFORM ASSOCIATION, AND LAWYERS FOR CIVIL JUSTICE AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

The National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C. § 1381 ("Safety Act"), directs the Secretary of Transportation to "establish by order motor vehicle safety standards." Federal Motor Vehicle Safety Standard ("FMVSS") 208, 49 C.F.R. § 571.208 (1987), regulates occupant crash protection, including seatbelt requirements. From 1967 through the time period at issue in this case, FMVSS 208 gave automobile manufacturers the option of installing a lap-only or lap/shoulder belt in the rear inboard seating positions of vehicles. In 1984, the National Highway Traffic Safety Administration ("NHTSA") specifically rejected a proposal that FMVSS 208 be amended to require lap/shoulder belts in all rear seats, and in 1989 the agency reaffirmed that decision as to rear center/aisle seats. NHTSA's decision to give manufacturers the freedom to choose either a lap-only or lap/shoulder seatbelt in rear center/aisle seats was the product of a deliberate policy judgment intended to further the objectives of the Act, including safety, technical feasibility, cost, and public acceptance.

The question presented is whether the Safety Act or FMVSS 208 pre-empts State tort claims that an automobile manufactured in 1993 was defectively designed because it contained a lap belt—rather than a lap/shoulder belt—in a rear center/aisle seat.

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INTEREST OF *AMICI CURIAE*[1]

The Grocery Manufacturers Association ("GMA") is the largest association of food, beverage, and consumer product companies in the world. Its members employ more than 2.5 million workers in all fifty States, with United States sales totaling over $460 billion annually. GMA leads efforts to increase growth and productivity in the food and beverage industry, and also works to promote the safety and security of the Nation's food supply. The organization applies legal, scientific, and political expertise from its member companies to vital public policy issues affecting the industry, and speaks for food and consumer product manufacturers at the State, federal, and international levels on legislative and regulatory issues. The National Association of Manufacturers ("NAM") is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all fifty States. NAM's mission is to enhance the competitiveness of manufacturers by shaping a legislative and regulatory environment conducive to the United States' economic growth and to increase understanding among policymakers, the media, and the general public about the vital role of manufacturing to America's economic future and living standards. The American Tort Reform

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. Besides *amici curiae* or their counsel, the Civil Justice Reform Group made a monetary contribution to this brief's preparation and submission. The parties have consented to the filing of this brief.

Association ("ATRA") is a broad-based coalition of more than 300 businesses, corporations, municipalities, associations, and professional firms that have pooled their resources to promote reform of the civil justice system with the goal of ensuring fairness, balance, and predictability in civil litigation. For more than a decade, ATRA has filed *amicus curiae* briefs in cases before State and federal courts that have addressed important liability issues. Lawyers for Civil Justice ("LCJ") is a national association of senior corporate and defense counsel supporting excellence and fairness in the civil justice system. It includes the support of the organized national defense bar which is composed of the DRI-Voice of the Defense Bar, Federation of Defense and Corporate Counsel, and the International Organization of Defense Counsel with a combined membership of over 20,000 defense practitioners from throughout the United States.

INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioners here and their *amici* question the continued vitality of the traditional principles of regulatory conflict pre-emption this Court explained and vindicated in *Geier v. American Honda Motor Co. Inc.*, 529 U.S. 861 (2000). *Geier*, like this case, arose from regulations promulgated under the National Traffic and Motor Vehicle Safety Act ("Safety Act"). And *Geier*, like this case below, turned on the traditional, commonsensical proposition that administrative agency practice, consumer safety, and economic efficiency can all be enhanced by Congress authorizing "a single, uniform set" of federal "standards" pre-empting "*all* state standards" that actually conflict with federal regulations. *Id.* at 870-71, 872.

"Why," *Geier* asked rhetorically, "would Congress not have wanted ordinary pre-emption principles to apply where an actual conflict with a federal objective is at stake?" *Geier*'s answer to that question—that "[s]ome such principle is needed," *id.*—remains logical and practically unassailable. For at least the last century, this Court has assumed that Congress would not want the law "to defeat its own objectives" so as to "destroy itself." *Geier*, 529 U.S. at 872 (citations and internal quotation marks omitted); *see also Adams Express Co. v. Croninger*, 226 U.S. 491, 507 (1913) (statute should not be interpreted "to destroy itself").

Petitioners here and their *amici* nonetheless assail *Geier*. Sometimes overtly and other times more subtly, they effectively request that federal law

in fact be permitted substantially to undermine its own objectives by allowing the survival of conflicting State law—so long as it is federal regulatory law that is destroyed and State common law that does the destroying. Specifically, Petitioners and their *amici* assail *Geier* by seeking permission for State trial-court juries to retrace and retroactively overturn the very same technical and economic determinations previously, painstakingly, and prospectively made by the responsible federal agency experts.

As demonstrated below, however, *Geier's* analysis remains convincing and workable, notwithstanding Petitioners' challenge. In particular, *Geier's* doctrinal explanations remain persuasive (*see* Section I.A, below); *Geier* can be readily applied to both health and safety and economic regulations (*see* Section I.B, below); *Geier* aligns nicely with the best international product liability practices (*see id.*), and *Geier* is strongly supported by the expansive understandings of conflict pre-emption held at Founding by, among others, Hamilton, Madison, and Marshall (*see* Section II.A, below). Nor is there merit to the recurring worries of Petitioners and their *amici* that a *Geier* conflict pre-emption analysis must be either crabbed and confined, or else unprincipled and unbounded. *See* Section II.B, below. Simply put, federal regulations should not be crimped or toppled merely because the disrupting agent happens to be a State court's judgment. Applying that commonsense holding from *Geier*, the Court of Appeal of California dismissed Petitioners' claims. This Court should now affirm that judgment.

ARGUMENT

In the interests, equally, of sound regulatory practice, the industries regulated by it, and the consumers who are its proper beneficiaries, Petitioners' invitation to upend settled conflict pre-emption doctrine should be declined.

I. TRADITIONAL PRE-EMPTION ANALYSIS IS A SETTLED AND VITAL COMPONENT OF OUR NATIONWIDE SYSTEM OF HEALTH, SAFETY, AND ECONOMIC REGULATION.

This Court's decision in *Geier v. American Honda Motor Co.* articulated with unusual clarity and cogency reason-based principles of federal pre-emption doctrine. Under *Geier*, State law, including State common law, retains its place. But *Geier* also gives the Constitution's Supremacy Clause its own proper scope of operation in those cases of actual, demonstrable conflict between the plain terms of federal regulatory standards and the potentially competing requirements of State common law liability rules. That full scope of operation is essential if federal regulatory law is to be squared with legal rationality, economic efficiency, and the best international practices.

A. Traditional Pre-emption's Vindication In *Geier* Ensured That Administrative Regulations Are Given Proper Pre-emptive Force.

Geier crystallized various pre-existing strands of federal pre-emption analysis in the context of administrative agency regulations. Without pre-emptive force, national regulatory regimes cannot

function effectively, and nationally regulated manufacturing companies cannot produce goods efficiently. Without *national* regulation that pre-empts conflicting State tort rules, Congress and federal agencies would simply be unable "to avoid the conflict, uncertainty, cost, and occasional risk to safety itself that too many [regulatory] cooks might otherwise create." *See Geier*, 529 U.S. at 871.

Enter the *Geier* Court. Drawing on what it repeatedly called "ordinary pre-emption principles," *id.* at 870, *Geier* painstakingly explained how traditional conflict pre-emption ought properly to work in the context of administrative agency regulations. Three of *Geier's* now-canonical conclusions bear special emphasis.

First, *Geier* makes clear that State trial-court juries and the damages they can award impose a form of regulation that might well conflict with federal law. Prior to *Geier*, certain opinions of this Court were sometimes read to mean that common law liability awards were qualitatively different from States' positive law enactments in terms of their susceptibility to federal pre-emption. *See Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 521 (1992) (plurality opinion); *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 487-90 (1996) (plurality opinion). *Geier* cut through the previous mixed signals and confusion to reach a firm conclusion that, in many situations, common law tort actions can vitiate agencies' "very ability to achieve [federal] law's congressionally mandated objectives that the Constitution, through the operation of ordinary pre-emption principles, seeks to protect." 529 U.S. at 872. *Geier* explained that, although Congress *could* write a statute that

"tolerat[es] ... conflict that those principles would otherwise forbid ... there [was] no reason to believe Congress ha[d] done so" in the Safety Act. *Id.*

Second, *Geier* established that an *express* statutory pre-emption provision, even one coupled with a common law *saving* provision, neither precludes nor distorts *conflict* pre-emption under traditional Supremacy Clause principles. Before *Geier*, various opinions of this Court had inconclusively explored the interaction of express pre-emption provisions with so called "implied" conflict pre-emption. *Freightliner Corp. v. Myrick*, 514 U.S. 280 (1995); *Cipollone*, 505 U.S. 504. Citing to canons of statutory construction, the *Cipollone* plurality opinion had speculated that "Congress' enactment of a provision defining the pre-emptive reach of a statute implies that matters beyond that reach are not pre-empted." 505 U.S. at 517. *Freightliner* later clarified that an express pre-emption provision does not "entirely foreclose[] any possibility of implied pre-emption." 514 U.S. at 288. But *Freightliner* then went on to state, "*Cipollone* supports an *inference* that an express pre-emption clause forecloses implied pre-emption; it does not establish a rule." *Id.* at 289 (emphasis added). At the same time, *Freightliner* declined to address whether and when a "saving clause" might absolutely foreclose ordinary conflict pre-emption of State common law. *Id.* at 287 n.3.

Geier cut through this confusion as well by invoking important doctrinal principles that apply broadly to pre-emption analysis. Although the Safety Act contains both an express pre-emption provision and a saving clause providing that

"compliance with" federal safety standards "does not exempt any person from any liability under common law," *see Geier*, 529 U.S. at 867-68 (quoting 15 U.S.C. § 1397(k) (1988) (alteration omitted)), *Geier* rejected a proposed "special burden" that would have placed a large thumb on the scale opposite any assertion of Safety Act pre-emption. *Id.* at 870-71. Here again, *Geier* reasoned logically, premising its analysis on an assumption that Congress would wish to see its enactments rationally and effectively applied. *See generally id.* at 869-71. *Geier* declared that, whether singly or together, an express pre-emption provision and saving clause "d[id] *not* bar the ordinary working of conflict pre-emption principles." *Id.* at 869 (emphasis in original).

Third, *Geier* establishes that structure matters greatly in evaluating the pre-emptive effect of regulatory enactments. *Geier* acknowledged that not all State common-law actions need be pre-empted by the Safety Act or its implementing regulations. When, for example, a car company's safety device is defectively manufactured or when, even absent a manufacturing defect, a device fails to work as intended in the field, then the Safety Act's saving provision precludes any possibility of a manufacturer successfully asserting a compliance-with-regulatory-standards defense. Here, for example, if Petitioners had alleged that the Williamson vehicle had been defectively manufactured or that Mrs. Williamson's seatbelt had failed to remain latched as intended at the time of the accident, federal pre-emption of State common law liability would not be appropriate. But those broad openings for the continued operation of State common law leave unanswered the pre-emption questions raised by Petitioners' actual

allegations. Those questions concern whether State common law can impose duties on automobile manufactures to design particular safety measures (in *Geier*, an airbag; here, a lap-and-shoulder-belt combination) into each and every one of their vehicles. To answer that question, the *Geier* Court analyzed the evolution and structure of the Safety Act's vehicle design and performance standards. The Court ultimately determined that the relevant regulations had been carefully framed to allow manufacturers to "*choose* among different passive restraint mechanisms," *Geier*, 529 U.S. at 878 (emphasis added), and that this express determination to allow manufacturers to make their own design choices disposed of the pre-emption question.

It is not necessary here to recount *Geier's* reasons for finding that allowing private design choice by manufacturers would serve the relevant regulations' underlying purposes. *Id.* at 875. Suffice to say that, as might be expected, different safety devices had different advantages and disadvantages. *Id.* at 877-78. The Court therefore took seriously the Department of Transportation's "deliberat[e]" intention to "provide[] the manufacturer with a range of choices among different" safety devices. *Id.* at 875. The agency's decision to adopt regulations that on their face expressly declined to impose a single design, while leaving open various options, was thus read as pre-empting contrary State law that attempted to dictate the private choices the agency had deliberately left open. In reaching its decision, *Geier* applied a sub-species of traditional conflict pre-emption that had not previously been so

well explained in the caselaw. *Id.* at 881 (explaining the nature of the conflict).

B. Application Of Traditional Conflict Pre-emption Principles Is Fully Appropriate In The Context Of Economic Regulation.

By emphasizing the nature and breadth of "ordinary pre-emption principles," even as applied to a statute with an express pre-emption provision and a savings clause, the *Geier* Court merely clarified and vindicated pre-existing pre-emption doctrine. Nonetheless, Petitioners and their *amici* contend the National Highway Traffic Safety Administration ("NHTSA") regulations at issue here—regulations that happen expressly to provide for a slightly different set of design options than those at issue in *Geier*—ought to be deemed distinguishable from the ones *Geier* analyzed. This hair-splitting view appears premised in turn on a view that regulations are somehow second-class pre-emption citizens, enjoying only diminished pre-emptive force, if drawn in significant part with cost considerations in mind. Pet. Br. 18-21. As demonstrated below, however, any such contention should be rejected.

As an initial matter, cost and safety considerations are not so easily segregated from one another. The lower the cost of new automobiles, for example, the higher new-vehicle sales will be, and the faster will be the fleet's turnover from less-safe older cars to more-safe newer cars. In this manner, lower cost means greater safety; the two considerations blend together at the margins, and attempts to disaggregate them are rendered largely artificial.

Significantly, this Court has rejected analogous attempts by pre-emption opponents to segregate health and safety concerns from "economic" concerns and make pre-emption analysis turn on such distinctions. In *Rowe v. New Hampshire Motor Transport Ass'n*, 552 U.S. 364, 373-74 (2008), the Court addressed the pre-emptive effect of the highway trucking provisions of the Federal Aviation Administration Authorization Act ("FAAAA"). There, the State of Maine defended its challenged regulations on grounds that they "help[ed] it prevent minors from obtaining cigarettes" and that federal law, while pre-empting State "economic" regulation, "does not pre-empt a State's efforts to protect its citizens' public health[.]" *Id.* This Court emphatically rejected the proffered distinction. It reasoned that, not only was there no basis in the Constitution or statute for such distinctions, "[b]ut it is frequently difficult to distinguish between a State's 'economic'-related and 'health'-related motivations[.]" *Id.* "'Public health' does not define itself," the Court noted, and, accordingly, creating a public health exemption from an economic pre-emption doctrine would lead only to multiplying confusions. *Id.* at 375. Petitioners here thus gain nothing by emphasizing that the relevant federal regulations are rooted in supposedly "economic" concerns as opposed to "public health" or safety.

This Court's precedents bear out the necessity of recognizing the pre-emptive force of federal economic regulations. To be sure, many of the Court's leading pre-emption decisions happen to have involved products, fact scenarios, or federal regulatory subject matters that present questions of potential or actual death or injury. *See, e.g., Wyeth v. Levine*, 129 S. Ct.

1187 (2009) (pharmaceuticals); *Altria Group, Inc. v. Good*, 129 S. Ct. 538 (2008) (cigarettes); *Riegel v. Medtronic, Inc.*, 552 U.S. 312 (2008) (medical devices); *Geier*, 529 U.S. 861 (seatbelts); *Lohr*, 518 U.S. 470 (medical devices); *Freightliner*, 514 U.S. 280 (trucks); *Cipollone*, 505 U.S. 504 (cigarettes).

But other leading cases involve statutes, fact patterns, and issues that are purely economic in nature. *See, e.g.*, *Rowe*, 552 U.S. 364 (trucking services); *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374 (1992) (airline pricing and services). *Morales* and *Rowe* illustrate how pre-emptive effect must be robustly granted to federal economic regulations in order to forestall a "state regulatory patchwork" that is "inconsistent" with Congress's determination to leave particular economic decisions "to the competitive marketplace." *Rowe*, 552 U.S. at 373. Concededly, market deregulation provisions, unlike health and safety requirements, generate few sensational fact-patterns suitable for television's legal dramas. But federal statutes grounded in cost-benefit concerns that deliberately leave economic decisionmaking to private parties do not lose pre-emptive force on that account.

In particular, and perhaps most relevant here, pre-emption is often used to ensure that elastically defined economic "torts" grounded in State law—such as deceptive trade practices claims, false advertising claims, and consumer protection claims—do not undermine federal agency regulations. Only days ago, for instance, the United States Court of Appeals for the Eighth Circuit addressed a federal pre-emption defense under the Organic Foods Production Act ("OFPA"), 7 U.S.C.

§ 6501 *et seq.* *See In re Aurora Dairy Corp.*, ___ F.3d ___, 2010 WL 3564849 (8th Cir. Sept. 15, 2010). The defendant in that case, a federally certified organic dairy, had been sued under various State tort theories alleging that its advertising and labeling misrepresented how "organic" its products were. Like the Safety Act in *Geier*, the OFPA includes an express pre-emption provision but not one that applies to State tort suits. Nonetheless, *Aurora Dairy* properly relied on *Geier* for the proposition that traditional pre-emption principles might still apply. *Id.* at *6. Carefully applying those principles, the Eighth Circuit found that certain State law claims would indeed conflict with federal organic certification processes and were therefore pre-empted. *Id.* at *8-10. One more blatant attempt to end-run a federal licensing scheme was thereby headed off.

Similar outcomes appear in recent federal district court and State cases. In *In re PepsiCo, Inc.*, 588 F. Supp. 2d 527, 537 (S.D.N.Y. 2008), the district court relied on the history and structure of Food and Drug Administration ("FDA") labeling regulations to conclude that the FDA was not concerned with the source of commercial bottled water, but rather with its purification. The court therefore rejected plaintiffs' claim of deceptive business practices where a bottled water company had complied with labeling requirements under the Food, Drug, and Cosmetic Act, 21 U.S.C. § 301 *et seq.* *PepsiCo*, 588 F. Supp. 2d at 537-39. Likewise, in *Guidroz v. Champion Enters.*, No. 05-1148, 2007 U.S. Dist. LEXIS 77611, at *33-38 (W.D. La. Jan. 26, 2007) (unpublished), a case closely paralleling *Geier*, the court found conflict pre-emption of State products liability law where the

Department of Housing and Urban Development intended to provide builders of manufactured homes with a set of "federally authorized options" for exterior wall design and construction. And in *Dowhal v. SmithKline Beecham Consumer Healthcare*, 88 P.3d 1, 8-11 (Cal. 2004), the California Supreme Court relied on *Geier* and conflict pre-emption analysis to reject claims that sellers of nicotine replacement therapies were required by State economic tort theories to provide labeling different from the labeling approved by the FDA.

In short, while Petitioners and their *amici* contend that the broad principles of pre-emption doctrine should be framed to drive forward evolving standards of health or safety, federal conflict pre-emption does not operate exclusively, or even primarily, in the context of health and safety regulation. Under the Supremacy Clause, federal economic regulations are frequently in need of protection from State intrusions, and State economic torts are frequently in need of displacement by federal law.

If this court were nonetheless to read a discount factor for economic considerations into its Supremacy Clause jurisprudence, it would place our nation at a competitive disadvantage. The European Union, for instance, unabashedly recognizes that product safety concerns should be analyzed in light of economic considerations. *See* Council Directive 85/374/EEC of 25 July 1985 on the Approximation of the Laws, Regulations and Administrative Provisions of the Member States Concerning Liability for Defective Products, 1985 O.J. (L 210) ("Directive 85/374").

Significantly, the European rule, like the American common law tort rule for products liability, makes few bright-line distinctions between risks and benefits based on cost or based on health and safety.

It goes without saying, perhaps, that framing an appropriate liability rule is only one element of creating a products liability policy. In Europe, although Directive 85/374 establishes strict product liability principles that parallel ours in some respects, the consequences of those principles have been mitigated by other factors unique to the European Union. National healthcare systems, for example, tend to reduce damages. In addition, European tort plaintiffs generally cannot hire attorneys on contingent-fee arrangements, typically bear the defendant's costs when they lose, and almost never have the benefit of broad American-style discovery procedures, civil juries, or punitive damages. Sandra N. Hurd & Frances E. Zollers, *Product Liability in the European Community: Implications for United States Business*, 31 AM. BUS. L.J. 245, 254-55 (1993); *see also* Andrew C. Spacone, *Strict Liability in the European Union—Not A United States Analog*, 5 ROGER WILLIAMS U. L. REV. 341, 343-44 (2000) (noting that the European Union was concerned "that the adoption of strict liability in the European Union would have led to the 'excesses' (*e.g.*, high judgments) of products law in the United States" and ultimately reached a "compromise between the interests of consumers and business").

In the United States, in contrast, a critical component of balancing strict product liability with commercial concerns has been federal pre-emption of State common law tort suits. Even given robust pre-

emption, a given company's litigation expenses are often orders of magnitude higher in the United States than in Europe. *See* Stephen B. Presser, *How Should the Law of Products Liability Be Harmonized? What Americans Can Learn From Europeans*, 2 GLOBAL LIAB. ISSUES, 13 n.8, 13 (Feb. 2002), *available at* http://www.manhattan-institute.org/pdf/gli_2.pdf ("Dow now spends 100 times as much [on litigation] (as a percentage of sales) in the U.S. as it does in Europe[.]"). Significant retrenchment on pre-emption would make the United States an international anomaly—a country with the strict products liability other countries employ for the sake of consumer protection, but lacking any of the limits the European Union places on strict liability for the sake of economic efficiency.

II. TRADITIONAL CONFLICT PRE-EMPTION IS ROOTED IN THE CONSTITUTION'S STRUCTURE AND SUPREMACY CLAUSE AND IS CAPABLE OF PRINCIPLED APPLICATION.

Traditional conflict pre-emption, just as much as express statutory pre-emption, is both rooted in the Constitution and readily applied to a broad swath of litigated cases, including this one.

A. The Founders Expected Expansive Conflict Pre-emption, Viewing It As An Essential Element Of The Constitution's Structure.

Geier recognized the straightforward constitutional rule that State laws that conflict with federal law are "nullified by the Supremacy Clause."

Geier, 529 U.S. at 873. This rule applies equally to *all* conflicts, *id.*, including those rooted solely in the plain terms of federal law, as well as those rooted in an express pre-emption provision. Moreover, conflict pre-emption applies equally regardless of whether the State law impossibly conflicts with federal law or merely poses some other obstacle to its operation. *Id.* at 873-74. Accordingly, even where Congress has not expressly pre-empted State law, and even where (as in *Geier*) the conflict flows from the structure of the relevant federal provision, the Supremacy Clause retains full force and effect.

Geier's conflict pre-emption analysis, while principally explained from the perspective of logic and reason, comports well with the jurisprudence, decisions, and understandings of leading Founders. The *fons et origo* of the Court's federal pre-emption jurisprudence is this Court's *conflict* pre-emption decision in *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824). Like *Geier* and this case, *Gibbons* involved a federally issued license. There, the relevant license authorized its holder to operate "vessels ... in the coasting trade." *Id.* at 2. In *Gibbons*, as in *Geier* and as here, those opposing federal pre-emption contended that the relevant federal authorization should be deemed good for purposes of federal law alone and that nothing in the plain terms of the authorization precluded States from piling on additional requirements. Indeed, the federal statute at issue in *Gibbons* was far less clear in granting Mr. Gibbons the option of potentially trading in New York waters (notwithstanding a conflicting New York statute) than the relevant Safety Act regulations are in granting car manufacturers an express option of selecting lap-belt-only restraints for

certain model years and seating positions. Nonetheless, the *Gibbons* Court, speaking through Chief Justice Marshall, found federal conflict pre-emption under the Supremacy Clause. In the process, the Court's opinion denounced in the strongest possible terms the essential argument that now recurs almost two centuries later—the proposition that "the original powers of the States" should be retained "if any possible construction will retain them[.]" *Id.* at 222.

The conclusion reached in *Gibbons* and *Geier* follows naturally from the original understanding of the Supremacy Clause. On this view, once a conflict between State and federal law is discerned, a Court's constitutional duty to nullify the conflicting State law becomes clear. Alexander Hamilton, writing in THE FEDERALIST, maintained that federal supremacy is "only declaratory of a truth which would have resulted by necessary and unavoidable implication from the very act of constituting a federal government[.]" THE FEDERALIST No. 33, at 202 (Hamilton) (Clinton Rossiter ed., 1961). Hamilton concluded that even apart from the Supremacy Clause any federal law constitutionally enacted "would be supreme in its nature, and could not legally be *opposed or controlled*." *Id.* at 205 (emphasis added). Moreover, while he disagreed with Hamilton over other key features of the Constitution's federalist architecture, Madison agreed with Hamilton on the pre-emption question. Like Hamilton, Madison recognized the need for broad and effective—not crabbed and ineffective—federal supremacy. *Id.* THE FEDERALIST, No. 44, at 287 (Madison) ("[A Constitution without supremacy] would have seen the authority of the whole society

every where subordinate to the authority of the parts; it would have seen a monster, in which the head was under the direction of the members.").

The response often given to contentions favoring broad federal conflict pre-emption of the sort favored by Chief Justice Marshall in *Gibbons* and endorsed by Hamilton and Madison in THE FEDERALIST is an exhortation for Congress to obviate the need for conflict pre-emption altogether by paying careful attention to crafting more express pre-emption provisions. 2010 ABA House of Delegates Resolution 117, *available at* http://www.abanow.org/2010/07/am-2010-117/. But over its first two and a quarter centuries, Congress never has spoken distinctly and in adequate detail as to when federal law should and should not displace State law, and it can confidently be predicted that it never will.

Congress does not speak clearly on pre-emption questions because it cannot. Congress is badly outnumbered by States, now by a ratio of fifty to one. It finds itself hobbled from quickly responding to shifting State encroachments on federal-policy territory by the practical brakes on lawmaking entailed by the Constitution's bi-cameralism and presentment requirements that so frustrated President Wilson and inflamed his admiration for the British Parliament. And it finds its federal policies attacked from multiple directions, as whatever policy equilibrium prevails at the federal level naturally comes under challenge from diverse and conflicting private interests, each of which appeals to that particular State or local jurisdiction most sympathetic to its own perceived plight. *Compare, e.g., San Diego Bldg. Trades Council v.*

Garmon, 359 U.S. 236 (1959) (finding implied conflict pre-emption of State law that would have shifted labor law in the favor of management), and *Machinists v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132, 150-51 (1976) (same); *with Chamber of Commerce v. Brown*, 128 S. Ct. 2408, 2414-18 (2008) (finding implied conflict pre-emption of State law that would have shifted labor law in the favor of labor). The result is a sitting-duck set of federal policies, targets painted brightly on their backs, that practically invites State infringements in various disguised forms and from multiple directions—without any hope of an effective congressional response.

Against this painful backdrop, and given the striking consensus among the Founders, it is surprising that originalist scholarship has sometimes fundamentally misconceived the foundations of Supremacy Clause analysis. *See, e.g.*, *Geier*, 529 U.S. at 908 & n.22 (Stevens, J., dissenting) (citing Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 231-32 (2000)). The *Geier* dissent, for example, spotlighted one such originalist analysis of the Supremacy Clause's language and origins. *See id.*

But what both the *Geier* dissent and the originalist scholarship it cited fail to appreciate is the structural context in which the Supremacy Clause operates. *See, e.g.*, *Nelson*, *supra*, at 260. For instance, somewhat analogous to the operation of the Supremacy Clause, a later legislature has power to nullify the acts of its predecessor legislature, just as the Congress has power to nullify and displace acts of State legislatures. Critically, however, in this example the legislature enacting the later law has

the benefit of actually knowing, or at least being capable of actually knowing, the precise contours of the earlier law. Contrast that situation with federal conflict pre-emption. In the conflict pre-emption context, as we have seen, Congress cannot possibly know in advance, or respond after the fact to, all of the *future* State infringements that federal laws inevitably elicit from multiple directions, fifty States, and divergent interests. Under these circumstances, the need to interpret conflict pre-emption to operate more expansively than the somewhat analogous rules governing displacements of earlier laws by later ones is apparent.

Accordingly, even putting aside the keen interest the Court has shown across many decades in the views of Hamilton, Madison, and Marshall, it is surprising that their pre-emption views have yet to sweep the field, given the recent upsurge in originalist scholarship. The probability that this notable trio are all wrong in their conviction that federal conflict pre-emption must be broad and robust—not narrow and enfeebled—must give pause to those scholars who favor narrow conflict pre-emption on originalist grounds. The Supremacy Clause states expressly that where federal law conflicts with State regulation, it is State law that must give way. But even without such express constitutional recognition, the need in the Constitution's very structure for the self-same principle was apparent—or at least that is what Hamilton and Madison believed, and what this Court's landmark decision in *Gibbons* strongly implies. It is unlikely that all three could be wrong.

B. Conflict Pre-emption As Understood By The Founders Can Be Applied To This Case In Principled Fashion.

The Founders' view that federal conflict pre-emption is primary and necessary and should be expansive remains to be applied to these facts. Notably, separate opinions from members of the Court have openly wondered whether federal conflict pre-emption of the breadth envisioned at the Founding was ever capable of principled application, or perhaps, whether it remains so today. *See, e.g.*, *Wyeth*, 129 S. Ct. 1187, 1204-07 (Thomas, J., concurring in the judgment).

But whatever difficulties might arise elsewhere, there is no difficulty finding conflict pre-emption here; no need to resort to debatable evidence; no need for concern over unbounded notions of pre-emption. Confirmatory support for a finding of conflict pre-emption appears, to be sure, in the NHTSA administrative record. But that confirmatory evidence is just that—additional evidence, not essential support. Rather, the underlying and pre-emptive collision between the NHTSA's seatbelt regulations and Petitioners' allegations of California tort liability is apparent solely on the face of the relevant delegation of regulatory authority; NHTSA's implementation of that delegation; and the essential elements of Petitioners' design defect product liability claims.

To understand the relevant conflict, consider the plain terms of the operative legal documents. *First*, Congress delegated to the Secretary of Transportation authority to establish a "coordinated national safety program," PUB. L. NO. 89-533, by

promulgating federal motor vehicle safety standards by taking into account "motor vehicle safety" as well as practicability factors such as the availability of technology and economic costs. *See* 49 U.S.C. § 30111(a). *Second*, NHTSA chose to implement that delegation by offering manufacturers two design options for seatbelts in the relevant seating positions for model years at issue in this case. *See* 49 C.F.R. § 571.208 (1987). *Third*, Petitioners describe their "theory of liability" as holding that "when the Williamson minivan was manufactured in 1993," there were "technologically feasible and cost-effective methods" of installing lap/shoulder belts in the rear outboard seating position in which Mrs. Williamson sat during the crash and that, if employed, those alternatives would have improved safety and reduced "a known risk of serious injury or death." *See* Pet. Br. 18. Petitioners thus chose to plead California common law violations that, if left unpre-empted, would require a jury to re-examine safety, technological feasibility and cost-effectiveness—the same three factors NHTSA balances under its delegated rulemaking authority.

The key point is that Congress is presumed to legislate against the backdrop of an informed understanding of preexisting law. *See Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 184-85 (1988) ("We generally presume that Congress is knowledgeable about existing law pertinent to the legislation it enacts."). The Congress that enacted the Safety Act is thus presumed to have known that instead of an administrative delegation it might alternatively have delegated authority to the federal courts to define *federal* common law liability rules, as it has done elsewhere. *See, e.g., Leegin Creative*

Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 899 (2007) ("From the beginning the Court has treated the Sherman Act as a common-law statute."). Of course, Congress is permitted to delegate rulemaking and adjudicating authority to agencies in lieu of granting common law powers to courts. *J. W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928). But that very choice entails a range of consequences that Congress must be presumed to have understood and intended.

In this case, NHTSA was created by Congress for the express purpose of making technical cost-benefit tradeoffs involving vehicle safety; it received its rulemaking authority from an express delegation of Congress; and it was staffed by experts with the advanced technical training needed to carry out the agency's mission. The agency then exercised its delegated authority to promulgate seatbelt regulations only after allowing participation by interested persons. *See generally* 5 U.S.C. § 551 *et seq.* And because its regulation fell within its delegated authority and was validly promulgated, this Court's precedents give NHTSA's regulation the "force and effect of law." *Batterton v. Francis*, 432 U.S. 416, 425 n.9 (1977).

Furthermore, precisely because of their institutional competence and informational advantages, agencies such as NHTSA—unlike common law litigants—are entitled to deference for reasonable interpretations of statutory mandates. *See generally Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984). Deference thus attaches where agencies reach their decision through a public process such as notice-and-comment

rulemaking, *compare Christensen v. Harris County*, 529 U.S. 576, 587 (2000), and where the nature of the agency decision merits deference, *compare Barnhart v. Walton*, 535 U.S. 212, 222 (2002). Likewise, legislation and regulations, unlike common law liability rules, are presumed to operate prospectively, not retrospectively. *See Martin v. Hadix*, 527 U.S. 343, 357 (1999); *Eastern Enters. v. Apfel*, 524 U.S. 498, 533 (1998). Here, for example, NHTSA's governing seatbelt regulations were finalized on November 2, 1989 but first applied to vehicles manufactured almost two years later, on or after September 1, 1991. *See* 54 Fed. Reg. 46,257 (Nov. 2, 1989).

Decisionmaking by State juries is far different and Congress must be presumed to know those differences. State juries decide cases based on narrow facts and the competing expert interpretations the parties choose to put forward. Juries deliberate in a black box, with no obligation to give reasons for their decisions. *See* Jerry L. Mashaw, *Small Things Like Reasons Are Put in a Jar: Reason and Legitimacy in the Administrative State*, 70 FORDHAM L. REV. 17, 20 (2001). Jury decisions imposing common law liability apply retroactively and are biased toward hindsight, for juries necessarily scrutinize and impose liability for past conduct. *See, e.g., Riegel*, 552 U.S at 323 ("A state statute, or a regulation adopted by a state agency, could at least be expected to apply cost-benefit analysis similar to that applied by [a federal agency.] A jury, on the other hand, sees only the cost of a more dangerous design, and is not concerned with its benefits; the patients who reaped those benefits are not represented in court."). In this

fashion, State tort verdicts force nationwide manufacturers to comply retroactively with State tort standards that can be predicted with more or less accuracy, but do not exist yet.

Given the stark differences—going far beyond stringency—between agency regulation and common law liability, it would be startlingly incongruous for the Safety Act to leave conflicting tort law unpre-empted. Congress's Safety Act delegation to NHTSA requires NHTSA to issue reasoned interpretations of Congress's delegated authority, promulgate prospective regulations, and base its regulations on the factors of safety, cost, and technological availability. It thus is difficult to explain why, for public interest reasons, Congress might choose, first, to delegate federal authority to set prospective requirements based on safety, technological feasibility, and cost to a group of experts on the national level; and, simultaneously, choose to leave States free to establish different, retroactively applied, requirements based on the same considerations of safety, technological feasibility, and cost at the local level.

Tellingly, *federal* common law, as this Court has held, is readily supplanted by *federal* legislation. *Northwest Airlines, Inc. v. Transport Workers Union of Am.*, 451 U.S. 77, 95 n.34 (1981) ("[O]nce Congress addresses a subject ... the task of the federal courts is to interpret and apply statutory law, not to create common law."). Given the Supremacy Clause, it would be anomalous if *State* common law were more resistant than federal common law to displacement by the federal government's own positive-law enactments.

In short, the conflict here is fundamental. It is not merely one of stringency and geographic scope, but also one of expertise, decisionmaking process, and prospectivity. It could hardly be more stark regardless of how one defines incompatibility for Supremacy Clause purposes. *Cf. Wyeth*, 129 S. Ct. 1187, 1207 (Thomas, J., concurring in the judgment). Congress must be presumed to have understood that, instead of administrative regulations, it might alternatively have chosen an authorization for federal courts to make federal common law. It presumably rejected that option because it wanted safety, feasibility, and cost to be balanced in reasoned fashion, prospectively, and by experts. Precisely because the Safety Act should not be interpreted "to defeat its own objectives" and thus "destroy itself," *Geier*, 529 U.S. at 872; *Adams Express*, 226 U.S. at 507, the Court should respect those choices and hold pre-empted California's conflicting liability rules.

CONCLUSION

The Court should affirm the judgment of the Court of Appeal of California.

Respectfully submitted,

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